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December 8, 1995

Julius Genachowski
Special Assistant
Federal Communications Commission
1919 M Street, NW., Room 814
Washington, D.C. 20554

Re: In the Matter of Revision of Rules and Policies for the Direct Broadcast Satellite Service, IB Docket No. 95-168/and PP Docket No. 93-253

Dear Julius:

As we discussed at our meeting of November 27, 1995, EchoStar Satellite Corporation ("EchoStar") believes that no DBS regulatory scheme can be successful at promoting DBS as an independent alternative to cable without restrictions on the conduct of dominant multi-channel video programming distributors in, among other things, the area of program access. In its comments in the above-captioned proceeding, EchoStar has proffered factual and economic evidence proving that the existing Commission rules are not sufficient to prevent the unfair practices prohibited by the 1992 Cable Act, 47 U.S.C. § 548(b), and should be strengthened in at least two respects. None of the commenters has proffered any evidence to rebut EchoStar's submissions. Indeed, at least one programming vendor has effectively conceded that, as EchoStar has argued all along, cable operators use their monopsony power to achieve discriminatory conduct by unaffiliated programming vendors. This letter will recapitulate EchoStar's recommendations in the

program access area and the evidence supporting the need for these recommendations.

First, the prohibition on discrimination by programmers should apply to all programmers, whether they are affiliated with cable operators or not. Discriminatory behavior by programmers against DBS operators is the result not so much of affiliation with cable operators as of the monopsony power exercised by cable operators. This is demonstrated in a recent article by Professor David Waterman that EchoStar and Directsat Corporation have cited in their November 20, 1995 Comments. David Waterman, "Vertical Integration and Program Access in the Cable Television Industry," 47 Fed. Com. L.J. 511, 514 (April 1995). In the reply comments round, none of the cable interests proffered any evidence to rebut Professor Waterman's conclusion. Indeed, the reply comments of at least one unaffiliated vendor provide powerful evidence corroborating that conclusion.

Lifetime Entertainment Services opposes EchoStar's recommendation on the ground that "[i]ndependent programmers cannot maintain a business, much less attract investment to support expanded system offerings, if the government mandates a below-market price for all customers." Lifetime Entertainment Services Reply Comments at 5. This statement, of course, effectively amounts to an admission that independent programmers discriminate in favor of dominant cable operators by selling them programming at below-market prices. Lifetime adds: "To the extent that cable market power skews the video marketplace, public policy should seek to invigorate that marketplace, not penalize its victims." Id. Naturally, EchoStar's recommendation is nothing other than an effort to level the playing field, which as Lifetime concedes is uneven, and to prevent cable operators from "skewing" the distribution marketplace by exercising their monopsony power and raising their rivals' costs. The Commission should resist Lifetime's suggestion that it do nothing to cure those admitted market distortions.

Second, the Commission should clarify that programming vendors squarely bear the burden of proving that a programming price differential in favor of a cable operator is justified by lower costs or economies of scale allegedly present when the

vendor deals with the cable operator. Specifically, when responding to a complaint by an independent satellite MVPD, vendors should not have the procedural opportunity to compare a contract with the complainant to a contract with another DBS provider (rather than to a contract with a cable operator). This opportunity allows the vendor to get away with "benchmarking" -- uniformly high prices charged to DBS providers and uniformly low prices charged to cable operators, as if the difference in the distribution technology accounts for lower costs and justifies lower prices for cable operators. Of course, EchoStar has established that the reverse is typically the case.

In their Comments, EchoStar and Directsat submitted a Declaration by Mr. Charles W. Ergen demonstrating that a programming vendor's costs in a transaction with a DBS distributor are typically lower than the same vendor's costs when dealing with a cable operator. See Appendix 1 to Comments of EchoStar Satellite Corporation and Directsat Corporation. Simply put, when selling to a DBS distributor the vendor need only supply programming at a single point -- the DBS distributor's uplink center. On the other hand, when dealing with a cable operator, the vendor typically has to serve several cable head-ends, with all the higher transmission and auditing costs that cable television's point-to-multipoint needs entail.

Mr. Ergen's showing has not been rebutted by any of the cable interests commenting in this proceeding. Indeed, no commenter has even argued that, contrary to that showing, a vendor's costs when dealing with cable operators are typically lower than (or even the same as) they are in a transaction with a satellite distributor.

In light of EchoStar's undisputed showing, the Commission should not allow vendors to get away with such cost-unjustified benchmarking and should revise the procedure governing program access complaints to avoid this.

Please call me if you have any questions regarding EchoStar's position in these matters.

Sincerely,

Pantelis Michalopoulos
Attorney for EchoStar Satellite Corporation

cc: Chairman Reed E. Hundt
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Commissioner Rachelle B. Chong
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